No. 09-769

Supreme Court, U.S.
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In The

Supreme Court of the United States

DIAMOND OFFSHORE DRILLING, INC.,

Petitioner,

versus

JIMMY LEWIS,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

OPPOSITION TO PETTTION FOR WRIT OF CERTIORARI

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COUNTER QUESTIONS PRESENTED FOR REVIEW

I. Does a lower court who allegedly commits error in its application of the *Daubert* test in ruling on the admissibility of expert testimony in an admiralty case, commit legal error by "lowering the standard of admissibility of evidence," or does it merely abuse its discretion in acting as gatekeeper under well-established law?

II. Under general maritime law, can a maritime employer be required to pay cure when:

A. the plaintiff has not reached maximum medical improvement, and is undergoing therapeutic treatments that are improving his condition;

B. future care will continue to afford him improvement, for a specified duration according to a specific treatment plan;

C. the employer fails to prove that there were collateral sources that supplied the injured employee with duplicative cure?

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OPINIONS BELOW

Respondent objects to those portions of the petitioner's statement that are nothing more than petitioner's erroneous arguments about the holdings of the courts below. Respondent vehemently objects to the statement that the appellate court held that there was "no valid scientific evidence of causation." This is simply false. Likewise false is the assertion that the appellate court relied upon pre-*Daubert* law. The appellate court found that it would not revisit the *Daubert* issue as it had previously considered it on interlocutory writs and found no abuse of discretion in the trial court's application of the doctrine. The court then went on to apply the law with regard to the standard of proof (featherweight) in Jones Act and general maritime law cases, which is of course an entirely different issue than admissibility of evidence under *Daubert*. *See e.g., Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 (2d Cir. 2004) (holding that even though a Jones Act "plaintiff faces a relaxed burden of proof with regard to causation, the district court's admission of expert testimony is nonetheless governed by the strictures of [Evidence] Rule 702 and *Daubert,*" and noting that the Sixth and Ninth Circuits have reached the same conclusion). Whether the appellate court failed to "adequately" discuss the law with regard to maintenance and cure is certainly a matter of opinion, and is hardly writ worthy even if true.

Moreover, there are erroneous factual statements made, such as that it is "undisputed" the causes of

SIBM are unknown and that it is incurable. Likewise erroneous is the contention that respondent alleged that his injuries are the result of SIBM. His injuries are the result of acute metal poisoning, exhaustion, and improper nutrition.

STATEMENT OF THE CASE

Jimmy Lewis is a functional quadriplegic. His condition differs from that of a true quadriplegic only in that his spinal cord is not severed. Instead, the muscles that are enervated by the nerves coming from the spinal cord do not work properly. Supp. Tran. 9/18/09, II of 8, at 59-60, 62, 63; III of 8, at 75, 76, 98, 100. His diagnosis includes quadriplegia, sporadic inclusion body myositis (SIBM), malignant hypertension, and intestinal inflammation all as a result of being poisoned by toxic chemicals and heavy metals while working aboard the vessel *Ocean Spartan*. Supp. Tran. 9/18/09, III of 8, at 78-80, 101-102, 111-112; P. Ex. 8, at 43, 143-144.

Mr. Lewis began working on the *Ocean Spartan*, a movable, ocean going drilling rig then working in the Gulf of Mexico, in 1987, as a Motorman. Supp. Tran. 9/18/09, II of 8, at 96-97. Mr. Lewis was an excellent employee, a fact conceded by his fellow employees and supervisors, and documented in his Employment Record, entered as a joint exhibit. Supp. Tran. 9/18/09, V of 8, at 99.

The *Ocean Spartan* sailed from the Gulf of Mexico to Lake Maracaibo, Venezuela, in 1991 and immediately began drilling operations. Supp. Tran. 9/18/09, II of 8, at 98. Lake Maracaibo is a highly polluted body of water, a fact known to the vessel's crew as well as supervisory personnel. Supp. Tran. 9/18/09, II of 8, at 104, VII of 8, at 27, 116. The Alfa Laval water making machine aboard the SPARTAN "wasn't designed to make water from the lake water." Supp. Tran. 9/18/09, V of 8, at 95. Yet, crew members testified that throughout the three years in Venezuela, in Lake Maracaibo, they were using the water maker. Supp. Tran. 9/18/09, II of 8, at 106-108; III of 8, at 31.

Despite company rules to the contrary, Diamond's tool pusher (the equivalent of the vessel captain), Wade Reason, testified that he regularly ordered that oil based mud be washed overboard into the waters of Lake Maracaibo. Supp. Tran. 9/18/09, VII of 8, at 94. The drilling mud was washed overboard in the immediate vicinity of the intake from which the vessel's drinking water was obtained from the lake. Supp. Tran. 9/18/09, VI of 8, at 122. Literature provided by Alfa Laval, the maker of the vessel's water making machine, warned against using the machine to process polluted water. Supp. Tran. 9/18/09, VI of 8, at 128. In addition, the machine malfunctioned to the extent that it pumped polluted lake water directly into the vessel's drinking water system. Supp. Tran. 9/18/09, II of 8, at 106-108; VIII of 8, at 31. The drilling mud used included quantities of antimony, arsenic, barium, calcium, lead, mercury, nickel,

vanadium and zinc, among other heavy metals and toxins detailed in Exhibit D-5 and all of which were found in similar concentrations in Mr. Lewis' body. Supp. Tran. 9/18/09, VI of 8, at 15; III of 8, at 78-80, 101-102, 111-112.

Mr. Lewis continued to work on the *Ocean Spartan* and to suffer recurring complaints. He sometimes felt weak while working on the *Ocean Spartan* in Lake Maracaibo but attributed his weakness to his constant diarrhea and nausea as well as having to work in temperatures which reached 140 to 160 degrees in the areas such as the Mud Room.[1] This subjected Mr. Lewis to heat shock.[2] As Mr. Lewis stated, he attributed his occasional feelings of weakness "to working conditions, stress, and heat, and bad water and food." Supp. Tran. 9/18/09, VIII of 8, at 7.

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[1] The Mud Room was the area in which the equipment used for circulating the drilling mud was located. The temperature of the mud as it came from the drill hole reached as much as 150 to 160 degrees Supp Tran. 9/18/09, VI of 8, at 9-10, 106-111. Mr. Lewis had to enter the area as often as six or eight times a day and spend extended periods there when working on machinery. Supp Tran. 9/18/09, II of 8, at 20.

[2] Heat shock is exposure to an extreme condition such as heat for a sufficient period of time, typically minutes, for the immune system of the body to mobilize a series of inflammatory proteins called heat shock proteins ("HSP"). These proteins, whose effect is long-lasting, reduce the body's protective system and make an individual chronically susceptible to toxic metal accumulation inside the mitochondria and cause death to the mitochondria. P. Ex. 8, at 43, 77.

Laboratory tests show that Mr. Lewis' body contains substantial amounts of antimony, arsenic, barium, cadmium, chromium, cobalt, copper, fluoride, lead, mercury, nickel, vanadium, and zinc. Tests also show that Mr. Lewis is highly allergic to many of the toxins contained in the drilling fluids used on the *Ocean Spartan*, arsenic in particular. Tests requested by his treating physician show that his particular genetic make-up, APO-3, makes it virtually impossible for his body to rid itself of the poisons encountered on the *Ocean Spartan*.

REASONS WHY WRIT SHOULD NOT BE GRANTED

I. No writ worthy *Daubert* errors were committed.

A. The lower courts applied *Daubert*, even if they did so in an erroneous manner.

1. The lower courts conducted *Daubert* hearings on each of Diamond's requests, and held that Dr. Jaffe's testimony was admissible under the *Daubert* standard.

Diamond pretends in its writ as if the lower courts ignored *Daubert* entirely, and held that the *Daubert* rule is not applicable in admiralty cases. This is simply wrong. Diamond asked for and received *Daubert* hearings with regard to the two experts it objected to, and even went to the

extraordinary step of taking intermediate interlocutory supervisory writs prior to trial with regard to one of them (Dr. Jaffe). *See* page 18, *infra*. It received a second *Daubert* hearing immediately prior to trial with regard to the other (Dr. Carter). Petitioner's real complaint is that *Daubert* was misapplied, not that it was ignored. And, it makes this complaint without any mention of the appropriate standard of review to be applied in determining whether the lower courts committed error in their *Daubert* rulings, which is "clearly erroneous." *See Mistich v. Volkswagen of Germany*, 666 So.2d 1073, 1079 (La. 1996). As is stated in this Court's Rule 10: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

2. The district court was not clearly erroneous in admitting Dr. Jaffe's testimony.

Diamond's main contention with regard to Dr. Jaffe's testimony is that his causation conclusion is not supported by any peer reviewed commentary, or empirical studies. This is incorrect, as will be demonstrated below. But even if it were, that would not be automatic grounds for exclusion. If Dr. Jaffe's conclusion is based upon sound scientific reasoning – the kind of analytic thought process employed by those in his field to opine about the causes of particular illnesses in the absence of concrete and definitive studies – than it meets the requirements of

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and is admissible. "[T]here is no bright-line standard and when an expert otherwise reliably utilizes scientific methods to reach a conclusion, lack of textual support may go to the weight, not the admissibility of the expert's testimony *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 354 (5th Cir. 2007). "In short, *Daubert* neither requires nor empowers trial courts to determine which of several competing theories has the best provenance." *Ruiz-Troche v. Pepsi Cola Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998) (citations omitted). This is true even in cases where a particular theory of causation advanced by an expert has not been studied before, and is not the subject of peer reviewed commentary.[3]

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[3] As the Fifth Circuit observed

> The lack of literature on injection-related salmonella infections of the joint does not undermine Dr. Coco's hypothesis. As the Supreme Court explained in *Kumho Tire*, "[i]t might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Where, as here, there is no evidence that anyone has ever contracted a salmonella infection from an injection of any kind into the knee, it is difficult to see why a scientist would study this phenomenon. We conclude, therefore, that the lack of reports in the literature that any knee injectable other than Synvisc has caused a salmonella infection, supports, rather than contradicts, Dr. Coco's conclusion that the infection

(Continued on following page)

There can be no doubt as to Dr. Jaffe's qualifications. Dr. Russell Jaffe, MD, Ph. D., CCN, is a Diplomat of both the National Board of Medical Examiners and the American Board of Clinical Pathology and has a dual certification for both Clinical and Chemical Pathology. He received his undergraduate and medical training at Boston University. He was at the National Institutes of Health (NIH) in Bethesda, Md., from 1973 through 1979, serving as a Senior Staff Physician from 1975 through 1979. While at NIH he worked in conjunction with Dr. King Engel in dealing with patients with Inclusion Body Myosotis. P. Ex. 8, at 33. Dr. Jaffe has served as a consultant with numerous industry groups and corporations including the Health Insurance Association of America and Royal Dutch Shell with regard to issues of hypersensitivity and immune reactions to heavy metals including mercury, cadmium and arsenic. P. Ex. 8, at 147-48. Dr. Jaffe worked on the first indoor environmental quality

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did not arise due to unsterile technique or other source not related to Synvisc.

Pipitone v. Biomatrix, Inc., 288 F.3d 239, 246 (5th Cir 2002), distinguishing *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 278 (5th Cir. 1998), *cert. denied*, 526 U.S. 1064, 119 S.Ct. 1454, 143 L.Ed.2d 541 (1999), and *Black v. Food Lion, Inc.*, 171 F3d 308, 312-13 (5th Cir. 1999). *See also Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062, 105 S Ct. 545, 83 L.Ed.2d 432 (1984) (cause and effect relationship need not be established by animal or human studies before a doctor can testify "as long as the basic methodology employed to reach such a conclusion is sound.").

report for the Department of Consumer Affairs of the State of California. These studies addressed the effect of heavy metals in the working environment. P. Ex. 8, at 147-49. Dr. Jaffe has been involved in developing functional and predictive tests to measure toxic metals at the cellular level and has developed methodology to examine the immune hypersensitivity of certain individuals who develop delayed reactions to heavy metals, such as mercury, cadmium and arsenic. P. Ex. 8, at 148. He is the Director and CEO of a nationally recognized testing laboratory. P. Ex. 8, at 8-9. In short, Dr. Jaffe is eminently suited to address questions such as those presented in this case including the cause of the cell death in Mr. Lewis' muscles and its relationship to heavy metals, the effect on the mitochondria and the creation of inclusions, and whether heavy metals caused, triggered or accelerated a previously benign condition. Further, with his laboratory and testing background, Dr. Jaffe is more than qualified to address issues regarding testing for heavy metals as well as their effect.

Nor is there anything lacking in Dr. Jaffe's methodology. He studied Mr. Lewis' medical records, and consulted extensively with Dr. Carter, the treating physician. P. Ex. 8, at 7-8, 13. He interviewed Mr. Lewis to rule out other potential causes of his condition. P. Ex. 8, at 25. He reviewed the toxicological reports of the conditions on board the rig. P. Ex. 8, at 16. He reviewed all the available literature on the subject of SIBM, including studies that have

ruled out a host of possible causes, such as genetics, psychological factors, viruses, and infections. P. Ex. 8, at 31, 133-134. But, it is important to note that the focus of Dr. Jaffe's inquiry was not SIBM in general, but rather the specifics of Mr. Lewis' case, a task for which he was particularly well suited given that he has studied the effect of heavy metals on the body as was presented by Mr. Lewis' situation. P. Ex. 8, at 31, 104, 147.

At this point, it is best to turn to the words of Dr. Jaffe himself, who best explains the soundness of his reasoning that produced his conclusion that Mr. Lewis' condition was caused, at least in part, by the conditions he was exposed to and under which he worked on the *Ocean Spartan*.

> Q. So it would be fair to say then that you're not aware of any credible scientific studies that established that heavy metal exposure causes sporadic inclusion body Myosotis? * * *
>
> A. The simple answer to your question is no, and there is a qualification. * * * The qualification is that I find strong evidence that exposure to toxic metals like lead, mercury, cadmium and arsenic at levels that Mr. Lewis could have been exposed to, at a time when he was distressed because of heat shock exposure that would have reduced his innate protective antitoxic mineral production and made him now newly and chronically susceptible to toxic metal

accumulation, and that toxic metal accumulation inside the mitochondria causes death to the mitochondria and a dead mitochondria become an inclusion body.

So I can point you to literature that says toxic metals are bad for mitochondria, they uncouple and electrically short-circuit the battery and the cell. The mitochondria is actually a cell inside our cells, this is a technical footnote, but mitochondria actually are independent organisms living inside our cells and they have their own DNA, they divide on their own sequence, it is a whole complicated history. But the relevant point here is that toxic metals at the level that Mr. Lewis was exposed to them might well have under certain conditions accumulated in him and caused the death of mitochondria, and those dead mitochondria become inclusion bodies, what we called in the biopsy inclusion body Myosotis. That's my reasonably certainly medical opinion.

P. Ex. 8, at 42-44.

A. The best evidence we have is that the people whose muscles die for lack of energy do so because their batteries, their mitochondria have been poisoned. That is the best information we have scientifically.

Q. And you mentioned early on there was a study you referenced that suggested that – well you said showed that in fact the inclusions could be caused by exposure to heavy metals.

A. Correct.

Q. What is that study?

A. The study is as follows: If you expose a cell or an organism to mercury or lead or cadmium, or more particularly to a combination of them, that you first find that their mitochondria become uncoupled, they do not produce energy. And if you keep that up chronically, you find that the mitochondria die and the remnants of them are what we call inclusion bodies and inclusion body Myosotis.

Q. Are these the same inclusions that you find in inclusion body Myosotis?

A. The same, the very same. * * *

Q. Is there more than one study?

A. There are several studies, but this particular study points out that lead causes the fibrillation, which means the production of what are abnormal proteins specifically something called alfa synuclean. And when that specific molecule inside the mitochondria gets oxidized, that mitochondria, that battery inside the cell is on its way to dying. And

if [it] doesn't get corrected, rehabilitated or protected by an antioxidant, by ascorbate, that mitochondria is on its way to dying.

And this study has been . . . in the test tube, but other studies where you feed lead, say inadvertently to battery workers in Vermont, you find that they get a specific kind of muscle fatigue and atrophy, and when you do biopsies and look at the ulrastructure you find inclusion bodies.

No it isn't inclusion body myositis, but it is inclusion bodies caused by toxic metals. So not all inclusion bodies are definitive for the diagnosis of inclusion body Myosotis, as often happens in science. * * * Medicine is a clinical art, it's a descriptive art, it is not as much of a science as we would like it to be.

Q. In your – have you attempted to do an extensive research of this question of the inclusions and the – and inclusion body Myosotis?

A. I have.

Q. Are you aware or have you found any research, any studies which rule out exposure to heavy metals as they cause an –

A. Not one, that has not been ruled out.

Q. Those exhibits you've produced for us, are those peer-reviewed documents.

A. Every one of these documents is peer reviewed.

P. Ex. 8, at 142-149.

Q. Can you say with any degree of medical probability whether Mr. Lewis would have accrued this disease even had he not been employed on the *Ocean Spartan*?

A. I can say within a reasonable degree of medical certainty that he would not.
* * *

Q. What basis do you have to say that?

A. Because you asked my considered scientific medical opinion, based on hundreds of hours of research, of synthesis of information, of doing my own discussions, as well as my readings of everything that I could – everything I could get my hands on, everything that was made available to me, I have put together. And it is my considered medical opinion that without his specific work history on the oil rig in Lake Maracaibo, Venezuela that he would not, in my opinion, have sporadic inclusion body Myosotis.

P. Ex. 8, at 99.

Dr. Jaffe's methodology, reasoning, and conclusion is not the kind of rank speculation that was rejected in *Food Lion*, because his approach to the problem reveals a well accepted method applying scientific principles which are well established in the literature as to how heavy metal intoxication could lead to death of the mitochondria and thus body inclusions. He used all the tools of medicine and science at his disposal to carefully evaluate the facts before him, and to reach a carefully considered opinion based upon the best science and information available to him.[4] True, unlike the defense experts, he did not throw up his hands and say, "SIBM, end of discussion – no cause, no cure." Rather, he was called upon to study the specifics of Mr. Lewis' case and determine the most probable cause of his present condition, given all that he had endured on the *Ocean Spartan*. There was sufficient information in the scientific literature, as well as in his own area of expertise, to allow him to complete this task.

The district court certainly was not "clearly erroneous" in allowing him to testify. And yet, even if it was, there would be nothing presented here except the failure to apply well established law correctly,

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[4] He even consulted a neurologist to confirm his approach and conclusions, thus eliminating one of Diamond's chief complaints that Dr. Jaffe was not qualified to opine because he was not a neurologist This Board Certified neurologist was in full agreement with Dr. Jaffe's logic, science, and conclusions P. Ex. 8, at 128-30.

which is not an error that justifies this Court's intervention.

B. Diamond continues to misrepresent this case as one involving admission of expert testimony regarding the cause of a disease which allegedly has an "unknown" cause.

The issue in this case is not whether metal poisoning is the cause of Sporadic Inclusion Body Myositis. It is not even whether heavy metals are *a* cause. It is whether the conditions experienced by Mr. Lewis aboard the *Ocean Spartan* – the toxic drilling mud, drinking contaminated water, eating unnutritious food, and working in 160 degree temperature – was a cause of his present condition, which is a quadriplegic state that has been characterized as adult muscular dystrophy, in addition to chronic diarrhea and high blood pressure.

One fact that Diamond continues to ignore in its "SIBM – no cause, no cure" approach to this case is that Mr. Lewis' alleged SIBM is very atypical. Generally the disease has a long latency period, and is characterized as an older person's disease, usually not beginning until at least the mid-50's and not manifesting itself to its full extent, and thus resulting in a wheel-chair confined life, until much later. Here, Mr. Lewis' case progressed rapidly, had a short latency, and struck fully when he was 35. P. Ex. 8, at 46, 76.

Accordingly, in evaluating the evidence of cause, it was the petitioner's experts who sought to look beyond the diagnosis of SIBM, and did not simply throw their hands up decrying this is a hopeless case. They probed further, and sought to determine the source of Mr. Lewis' condition, whether it was independent of SIBM, the result of an exacerbated case of SIBM, or SIBM itself. In so doing, they relied upon all the tools available to them, as well as their high degree of specialization and skill. There was no error in the evidence that the jury received on the issue of cause, even if, conceding for the sake of argument that the general cause of generic SIBM in the population at large might not be presently known.

C. State law procedural matters prevent any potential *Daubert* issue from being writ worthy.

This Court should not reach the admission of Dr. Jaffe's testimony, because Louisiana procedural law[5] renders any *Daubert* challenge to their testimony moot. Prior to trial, Diamond took interlocutory writs to the Louisiana Fourth Circuit Court of

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[5] *See e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), state *forum non conveniens* law applies in maritime cases and is not preempted by federal maritime law because the state law did not work a material prejudice to a characteristic feature of general maritime law, and that uniformity is not required on matters related to procedure.

Appeal, which held that there was "no abuse of discretion" in the trial court's denial of Diamond's motion to exclude Mr. Jaffe's testimony. *See Lewis v. Odeco*, 2006-C-1485 (La. App. 4th Cir. 11/14/06) ("Writ Denied. We find no abuse of discretion by the trial court."). On appeal, the Fourth Circuit refused to revisit that issue, relying on the "law of the case doctrine" to find that it had already reviewed that issue, and would not do so again. *See* App. 11-12.

Accordingly, before any court could properly reach the *Daubert* issue, it would have had to find error in the intermediate appellate court's handling of the issue. Yet, Diamond did not even assert a single reason in its writ application for why the law of the case doctrine was improperly applied. "The law of the case principle is not applied to prevent a higher court from considering the correctness of a ruling by an intermediate appellate court. *Pitre v. Louisiana Tech University,* 673 So.2d 585, 589 (La. 1996), *cert. denied,* 519 U.S. 1007, 117 S.Ct. 509, 136 L.Ed.2d 399 (1996)." *Levine v. First National Bank of Commerce*, 948 So.2d 1051, 1057 (La. 2006). Nonetheless, unless consideration of an issue previously decided by a lower court is necessary for advancement of the law, the first step in determining whether to review an issue subject to the "law of the case" doctrine in a lower court is to determine whether the lower court erred in its discretionary application of the doctrine to its own ruling. *See Pumphrey v. City of New*

Orleans, 925 So.2d 1202, 1208 (La. 2006).[6] Diamond does not even bother to explain how this case presents a *Daubert* issue for this Court, since any purported *Daubert* issue with regard to Dr. Jaffe was settled long ago, on interlocutory writs, and the Louisiana appellate courts properly applied their own rules of appellate review to conclude that reconsideration of the issue was procedurally improper.

II. There is no writ worthy issue regarding the sufficiency of the evidence

The standard of review is narrow on a causation issue since a seaman is entitled to recover if it is shown that the fault of the defendant played any part, however small, in causing the injury. If there is any evidence from which the jury may infer that negligence played some contributing role in bringing about the injury, even though entirely circumstantial the burden of proof is met. *Rogers v. Missouri Pacific*

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[6] This is logical because if a higher court simply ignores the doctrine, and reviews any issue subject to the doctrine anew, as if it had never been raised before, then the purposes of the law of the case doctrine are frustrated. These purposes include avoiding relitigation of the same issue, promoting consistency of results, and encouraging efficiency and fairness to the parties by affording a single opportunity for the argument and decision of the matter at issue *See Coury Moss, Inc. v. Coury*, 981 So 2d 936, 939 (La. App. 3rd Cir. 2008), *writ denied*, 981 So.2d 936 (La. 2008); *Terrance v. Dow Chemical Co* , 971 So.2d 1058, 1063 (La. App. 1st Cir. 2007), *writ denied*, 970 So.2d 534 (La. 2007)

Railroad Co., 352 U.S. 500, 506-07, 77 S.Ct. 443, 447-48 (1957). The Fifth Circuit has frequently characterized this burden of proof as very light or featherweight. *See Vallot v. Central Gulf Lines, Inc.*, 641 F.2d 347, 350 (5th Cir. 1981). Moreover, the jury is entitled to make permissible inferences of causation from unexplained events. *Landry v. 2-R. Drilling Company*, 511 F.2d 138 (1975).

Dr. Jaffe's testimony was more than sufficient to meet that standard of proof, and even if it was not, there is no writ worthy issue to consider here – just an error in the application of a well-established rule. Contrary to Diamond's contention, the Court of Appeal's reliance on *Davis v. Odeco*, 18 F.3d 1237 (5th Cir. 1994), *cert. denied, sub nom., Murphy Exploration Company v. Davis*, 513 U.S. 819, 115 S.Ct. 78, 130 L.Ed.2d 32 (1994), was not error. *Davis* was not a pre-*Daubert* case, as Diamond contends. *Davis* had nothing to do with admissibility of expert testimony. Rather, *Davis* was a case which clearly held that the opinion of an expert, if admitted, that plaintiff's exposure to hydrocarbons caused him to contract a rare disease was sufficient to meet the "featherweight" standard because "there was not a complete absence of probative factual evidence on the issue of medical causation – as there must be to overturn a jury verdict under the Jones Act. *Id.*, at 1242.

If anything, it is Diamond that is trying to use this writ to entreat this Court to change the law, by conflating the *Daubert* test with the burden of proof

standard in maritime cases. Diamond would have this Court use the *Daubert* rule to decide whether the burden of proof has been met, thus eviscerating the "featherweight" standard of proof, instead of respecting that the *Daubert* issue relates to admissibility of evidence, leaving to the jury the role of evaluating the weight to be given to evidence presented to it. Current case law recognizes this distinction. There is no reason given by Diamond for this Court to grant writs and overturn that body of jurisprudence.[7]

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[7] Interestingly, in the *Davis v. Odeco* case, the defendant sought writs to this Court making the identical argument Diamond makes herein:

> The age of "toxic tort" litigation is upon us. In increasing numbers, litigants are asking lay juries to decide complex medical issues which decades of medical experts have been unable to resolve. The Fifth Circuit's decision, if allowed to stand, means that any Jones Act claimant may, on the most scant medical evidence, establish employer negligence and medical causation to support a jury award for any disease which develops, regardless of the tenuous connection between employment and genesis of the disease. This is an issue of significant importance, as a single medical witness who makes a causal connection for a Jones Act plaintiff under his "featherweight" burden of proof can *12 now establish employer liability. This is a departure from the direction of this Court's decisions, such as *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

Murphy Exploration & Production Company, Petitioner v. Willie Earl Davis, Respondent, 1994 WL 16101716 (Appellate Petition,

(Continued on following page)

III. There is no writ worthy issue about maintenance and cure for an incurable disease.

Maximum medical cure occurs when "it is probable that further treatment will result in no betterment in the claimant's condition." *Rashdi v. Am. Presidential Lines*, 96 F.3d 124, 128 (5th Cir. 1996). *See e.g., Boudreaux v. United States,* 280 F.3d 461, 468 (5th Cir. 2002). ("As the court found that further treatment would, in fact, improve Boudreaux's condition, it necessarily follows that he has not reached maximum medical cure.").

Both Dr. Carter, the treating physician, and Dr. Jaffe testified that Mr. Lewis would improve, if he continued to receive chelation therapy and hyperbaric treatment, although he would never be cured. P. Ex. 8, at 138. The jury was shown a video tape documenting the effects of the treatment, and showing that Mr. Lewis has regained some use of his extremities as a result of treatment. *See* P-Ex. 20. Dr. Paul Harsch, the doctor administering these treatments, concurred that more treatment would produce even further gains. Supp. Tran. 9-18-07, IV of 8, at 13-16.

There was no error in the application of these facts to the law. The jury was free to reject Diamond's

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Motion and Filing) (U.S. Jun. 10, 1994) Petition for Writ of Certiorari (No 931986) This Court denied certiorari. *Murphy Exploration & Production Co. v. Davis*, 513 U.S. 819, 115 S.Ct. 78, 130 L.Ed.2d 32 (1994).

repeated mantra that Mr. Lewis' condition was "incurable," and accept the more humane view that anything that would improve his condition should be done, and the law provides that Diamond is liable for any expenses incurred in so doing.

Moreover, if there was error, it was harmless. The Court of Appeal shifted a future medical care award of $1.2 million from general damages to "cure." If these damages were not available as "cure," they were available as general damages, and so Mr. Lewis has received no undue recovery.

IV. There is no writ worthy issue about future cure.

Future cure is awardable in certain circumstances. Future maintenance and cure can be awarded only in "such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained," at the time of the award. Moreover, maintenance and cure cannot be awarded beyond the time when maximum possible cure has been affected, and the seaman's physical condition has become fixed beyond further improvement. *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 532 (9th Cir. 1962), citing *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 531-32, 58 S.Ct. 651, 82 L.Ed. 993 (1938).

Respondent's complaint here is that there was an error in the factual finding that Mr. Lewis' need for

care was "immediate" and for a "period which can be definitely ascertained." Such alleged factual errors do not present a writ worthy consideration for this Court.

Moreover, any error is moot. If "future cure" should not have been awarded, the amount of "future cure" awarded here, $1.2 million, would have to be added back into general damages, from which it was subtracted by the Court of Appeal. At the end of the day, the amount of Mr. Lewis' recovery is completely unaffected.

V. There is no writ worthy issue with regard to collateral payments.

Diamond attempts to fabricate a legal issue with regard to alleged collateral payments made to the Lewises, for which it should have received a credit against its cure award. Pretermitting the issue of whether the collateral source rule applies, the Court of Appeal rejected any credit because Diamond failed to carry its burden of proof with regard to the existence or amount of such collateral payments. Moreover, Diamond failed to plead the affirmative defense of set-off as it was required to do in order to claim this credit. Even if there was a mistake as to

the proof,[8] which there was not, no legal error worthy of this Court's attention was committed.

CONCLUSION

For the reasons expressed herein, petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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[8] There was no mistake as to Diamond's failure to prove its claim. The only evidence it can point to are the Lewis' medical records, which were admitted by stipulation. Diamond, however reserved the right to question Mr Lewis about whether any expenses reflected therein were "actually incurred," *see* Supp Trans 9-18-08, III of 8, at 5, but it did not avail itself of this opportunity Moreover, while the records might show who paid some of the bills, such as Medicaid or Mr. Lewis' private insurer, they do not show what subrogation rights attached to these payments. If Medicaid had a right to subrogation (which it does under federal law) or if Mr. Lewis' insurer had such a right under the terms of the insurance policy (which is customary), then these "collateral" payments were not free of cost to Jimmy Lewis, and allowing Diamond a set-off would double penalize Mr. Lewis for them.